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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. ——

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on April 16, 1958, a petition for rehearing having been denied on September 24, 1958.

OPINIONS BELOW

The opinion of the district court (R. 49–63) is reported at 145 F. Supp. 157. Its findings of fact and conclusions of law (R. 64–72) are unreported. The opinion of the court of appeals (App. A, *infra*, pp. 18–20) is reported at 254 F. 2d 116. Its opinion on petition for rehearing (App. C, *infra*, pp. 22–25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1958 (App. B, *infra*, p. 21). A timely petition for rehearing was denied on September 24, 1958 (App. C, *infra*, p. 22). By orders of Mr. Justice Douglas, dated December 19, 1958, and January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and including February 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a frozen foods processor who freezes vegetables and packs them in bulk containers during the harvesting season, stores them until after the season has ended, and thereafter repackages them in consumer packages is engaged in the "first processing of * * * fresh fruits or vegetables" during the post-seasonal storing and repackaging so as to be exempt under § 7(c) of the Fair Labor Standards Act from the overtime requirements of the Act.

2. Whether a frozen foods processor who mixes vegetables previously frozen by it with vegetables purchased, already frozen, from others is entitled to the exemption under § 7(c) while engaged in preparing and packaging the mixed vegetables.

3. Whether the repackaging or mixing operations qualify for an additional exemption under § 7(b)(3) of the Act.[1]

---

[1] The exemption under § 7(c) is limited to a maximum of 14 weeks per year. Section 7(b)(3) provides an additional 14-week exemption (up to 12 hours a day and 56 hours a week) for industries "found by the Administrator to be of

STATUTE INVOLVED

Section 7 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*) provides in part:

> (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> * * * * *
>
> (c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in

---

a seasonal nature." The Administrator has determined that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" within the meaning of § 7(b)(3). 5 Fed. Reg. 3167. Since the wording of the § 7(b)(3) industry determination is substantially identical to that of § 7(c), the availability of both exemptions turns, initially at least, on the same question—the meaning of "first processing"—and the § 7(b)(3) exemption is not separately discussed in this petition. The question is separately preserved, however, both because both exemptions were allowed by the courts below and because, should the Government not prevail on its main contention, there may be additional reasons for sustaining its position under § 7(b)(3). See note 9, *infra*.

any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

STATEMENT

1. Respondent Oregon Frozen Foods Company (Oregon) is engaged in the production and sale in interstate commerce of frozen corn, carrots, and mixed vegetables (R. 14). During the harvesting season, it receives from nearby growers large quantities of corn and carrots which must be promptly processed and frozen. As part of the preparation for freezing (in addition to cutting, cleaning, *etc.*), the vegetables are subjected to steam for several minutes in order to kill the enzymes that are responsible for organic growth and deterioration (R. 16–18, 122). This "blanching"—in effect, a "partial cooking" (R. 17, 98, 124)—also softens the vegetables and intensifies their color (R. 122–123). After being quick-frozen in a loose form (R. 83), some of the vegetables are immediately packaged in consumer-size packages. Normally, however, only a small part of the vegetables

(*e.g.*, less than one-third of the 1954 corn crop (R. 24)) are so packaged during the season. The balance is packed in bulk containers and placed in cold storage for repackaging after the season ends (R. 17, 25, 52).

Although it is desirable to dispose of the frozen vegetables as soon as possible after the season ends, in order to avoid the risk of dehydration during storage, the lack of firm orders for the vegetables—a large part of which are packaged under "buyers' labels" (R. 82, 112)—often causes the repackaging operations to be spread out over many months (R. 89). Thus, although the active corn season extends only from August 1 to October 10, the repackaging of bulk-frozen corn continued, for the 1954 crop, until the following May 22; for the 1953 crop, until August 1; and for the 1952 crop, until February 1 (R. 66). The active carrot season is from October 15 to December 1, but the repackaging of carrots continues throughout December (*ibid.*).

In addition to repackaging the bulk-frozen corn and carrots as such, Oregon also prepares and packages, from October into January, a vegetable mix consisting of corn, carrots, lima beans, string beans, and peas (R. 14). The vegetables other than corn and carrots it purchases, already frozen in bulk, from frozen food processors in Oregon, Washington, and California (R. 19). All the vegetable mix is packaged under "buyers' labels" (R. 112).

Oregon employs some 300 production workers to process corn during the active corn season, but retains only 20 after the end of the season to sort, in-

spect, grade, and repackage the bulk-frozen corn (R. 19). It employs 40 production workers to handle carrots during the active carrot season, but retains only 20 after the season to repackage the bulk-frozen carrots and prepare the vegetable mix (R. 20).

2. Section 7(a) of the Fair Labor Standards Act of 1938 (*supra*, p. 3) requires that employees engaged in the production of goods for commerce be paid time-and-a-half for work in excess of 40 hours a week. Section 7(c), however, provides that:

> * * * in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables * * * the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

In 1952 and 1953, Oregon, claiming exemptions under §§ 7(b)(3) and 7(c), did not pay overtime rates for work performed during selected weeks, some of which were during the active harvesting season when Oregon was engaged in processing and freezing freshly-harvested vegetables, while others were during periods in which Oregon was engaged in storing, repackaging, and mixing vegetables previously frozen and stored in bulk (R. 23, 36). It is stipulated that Oregon will continue that practice unless enjoined in this action (R. 23–24).

3. On July 15, 1954, the Secretary of Labor brought this action, under § 17 of the Act, seeking an injunction restraining Oregon from violating the overtime re-

quirements of the Act (R. 3–6). It was conceded that Oregon was entitled to an exemption under § 7(c) during periods when it was engaged in the original freezing and packaging (either in consumer-size packages or bulk containers) of the vegetables received during the harvesting season (R. 30–32, 67). It was contended by the Government, however, that the post-seasonal storing, mixing, and repackaging of the vegetables previously frozen in bulk did not constitute "first processing" within the meaning of § 7(c) and hence that Oregon was not entitled to an exemption when so engaged (R. 27).

The district court held that the repackaging of the bulk-frozen vegetables was not a "new process" but a "reasonable continuation and part of 'the first processing of perishable or seasonal fresh fruits or vegetables' ", which was not completed until the vegetables were "packaged in consumer size packages even though delayed" (R. 62, 68). It accordingly held that Oregon was entitled to an exemption when engaged in the post-seasonal repackaging operations (R. 49–63).[2] The court of appeals affirmed, holding in its first opinion that the question turned upon "factual issues" and that the "facts support the conclusion adopted" (*infra*, p. 20). In an opinion denying rehearing, the court explained its first opinion as holding simply that the district court's "interpretation of the clause of the statute relating to 'first processing,' in view of the facts found in the record, was correct" (*infra*, p.

[2] It also upheld Oregon's claim of an additional exemption under § 7(b)(3). See note 1, *supra*.

22). The court further stated, however, that blanching and freezing did not amount to "processing" at all (*infra*, pp. 24–25).

REASONS FOR GRANTING THE WRIT

1. Even limited to its impact upon the frozen foods industry itself, the question presented by this case is of substantial importance in the administration of the overtime provisions of the Fair Labor Standards Act. The frozen foods industry processes a major, and constantly increasing, share of the national food production. Because of its obvious advantages, the practice of storing frozen produce in bulk and repackaging it after the rush of the season has ended is already widespread in the industry. That those advantages are being increasingly recognized is evidenced by the report that during the 1957 season some western packers changed from the use of the usual 50-pound storage containers "to bulk containers holding as much as 1,500 pounds of frozen vegetables." *Bulk Bins Save on Frozen Food Storage,* Western Canner & Packer, Vol. 49, No. 10, p. 211 (Oct. 1957). As that article points out (*ibid.*), the "economies presented in the procedure are apparent": "From bulk storage the packer can package as orders and labels are received. Premium labor can be avoided, and packaging can be done by the regular crew after the rush season has passed."[3] The decision in this case, there-

[3] Other obvious advantages are that less packaging equipment is necessary; that bulk storage may afford greater protection against dehydration than does storage in consumer packages (see R. 135); and that any dehydrated pieces can be removed during the repackaging process (see R. 25–26).

fore, will affect many thousands of workers throughout the frozen foods industry.

While the exemption granted by § 7(c) is limited to a maximum of 14 workweeks—some of which the packers are admittedly entitled to utilize during the harvesting season—the importance of the question is increased by the fact that there is available an additional 14-week exemption under § 7(b)(3) defined in terms identical to the relevant part of § 7(c).[4] While the latter exemption is limited to a maximum of 12 hours a day and 56 hours a week (the § 7(c) exemption contains no hours limitation), judicious selection of the weeks to which to apply each exemption results in a substantially complete exemption for a total of 28 workweeks per year—over half the year and probably sufficient to cover any occasions on which use of overtime might be desirable. In short, the decision below, by permitting the exemptions to be utilized during repackaging operations, effectively gives the fruit and vegetable frozen foods industry a year-round exemption from the overtime requirements of the Act.

2. The question on the merits is substantial. The exemption is granted for the "first processing of * * * perishable or seasonal fresh fruits or vegetables." The clear purpose of the exemption is to afford relief from the maximum-hour limitations during periods when the use of overtime is made unavoidable by the "seasonal" influx or the "perishability" of the produce—that is, by natural factors beyond

[4] See note 1, *supra*.

the control of the packer.[8] Viewed in the light of that purpose, "first processing" should, we submit, be interpreted as terminating when the vegetables have been "processed" to a non-perishable state and there

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[8] Even the court below has recognized this underlying purpose of the § 7(c) exemption. See *McComb* v. *Hunt Foods, Inc.*, 167 F. 2d 905, 906–907 (C.A. 9), certiorari denied, 335 U.S. 845, stating:

> The Wage and Hour Division has recognized the clear intendment of the statute in this language:
>
> "The purpose of Section 7(c), as shown by the legislative debates, was to relieve processors and packers of seasonal agricultural commodities from the burden of paying overtime compensation during those peak seasons of the year when large fluctuating quantities of perishable agricultural commodities move from the farms to the processing establishments, which commodities must be processed as soon as they arrive." Wage and Hour Release No. 1892, Jan. 25, 1943.

For other cases recognizing, in differing contexts, the "seasonal" purposes of the various § 7(c) exemptions, see *Walling* v. *Swift & Co.*, 131 F. 2d 249, 251 (C.A. 7) ("It was the purpose of Congress, in granting this exemption, to enable the employer to avoid the burden of time and one-half for overtime in those seasonal or peak periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control."); *Hendricks* v. *Di Giorgio Fruit Corp.*, 49 F. Supp. 573, 575 (N.D. Cal.) ("The legislative history of the Act shows that Congress realized that perishable or seasonal fresh fruits or vegetables must be processed when they reach the proper stage and that such stage depends upon natural factors which man cannot control."); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393, 401–402 (S.D. Cal.); *Shain* v. *Armour & Co.*, 50 F. Supp. 907, 911–912 (W.D. Ky.); cf. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 271.

is a break in the processing operations. The subsequent operations are free of the seasonal or perishability pressures that are the very reason for the exemption.

a. In this case, when the vegetables have been frozen and stored in bulk at zero temperatures, they are no longer "perishable", in the sense that the word is used in the statute,[6] and the initial processing has been halted. The rate at which the repackaging is done after the season ends is governed not by natural factors but by the employer's convenience and the receipt of orders. That there does not then exist the necessity for overtime that justifies the exemption is convincingly shown, in this case, by Oregon's drastic reduction of its work force at the end of the active corn season from 300 to 20 employees. When, therefore, upon receipt of orders, Oregon withdraws

[6] There is some risk of dehydration if frozen vegetables are stored too long, but that is largely controllable by storage conditions (R. 144–145). In any event, such long-term dehydration involves deterioration of a very different order—both in terms of causation (bacteriological or enzymatic causes as contrasted to the operation of external physical forces) and in terms of urgency (a few days as contrasted to many months)—than that normally associated with "perishability." The risk of dehydration, moreover, is alleviated not by the repackaging as such but only by the final sale and consumption of the vegetables. So long as the vegetables are to be stored, the evidence is that they are less subject to dehydration when stored in bulk than when stored in consumer packages (R. 135). Thus the rate of repackaging is controlled not by perishability but by the receipt of orders. Indeed, the possibility of partial dehydration would, if anything, seem to require that repackaging be postponed until orders are received, so that the dehydrated vegetables can be removed during regrading.

the previously "processed" vegetables[1] from storage and regrades, reinspects, and repackages them, it should be treated as being engaged in "secondary" processing incidental to its marketing operations and not in the "first processing" necessary to preserve fresh fruits and vegetables from spoilage.

That interpretation of "first processing" has been consistently followed by the Administrator of the Wage and Hour Division since the adoption of the Act. The regulations now provide (29 C.F.R. (1958 Supp.) 780.51(b)(1)):

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[1] The suggestion of the court below, in denying rehearing, that blanching and freezing do not amount to "processing" at all (*infra*, pp. 24–25) is difficult to understand. Unless they are "processing" they cannot be "first processing", which is the very basis upon which the exemption was allowed. It is clear in any event that freezing is "processing", not only in the common acceptance of the term (*e.g.*, the industry's own directory is entitled *Directory of Frozen Food Processors* and the *1954 Census of Manufacturers* lists the industry under "frozen food processing establishments") but also in the sense that it significantly changes the form of the commodity. There can be no question that blanching (which kills the enzymes and "partially cooks" the vegetables (R. 17, 98, 122–124)) and freezing (which "disorganizes the tissues, renders them permeable, and liberates enzymes" (Cruess, *Commercial Fruit and Vegetable Products* 765 (1948); R. 139, 143)) change the natural state of the vegetables just as surely as "bulking" does tobacco. See *Mitchell* v. *Budd*, 350 U.S. 473. In addition, quick-freeze plants, like tobacco-bulking plants, require a large amount of expensive equipment of an industrial type, including conveyor belts, equipment for washing, sorting, dicing and cutting, steam chambers, freezing tunnels, refrigeration equipment, packaging machinery, and zero-temperature storage rooms. See R. 16–19. The question in this case, in short, is not whether any of the steps amount to "processing," which they clearly do, but whether the discontinuous operations should be viewed as separate processings or as one single processing.

> An employer who commences processing operations on a perishable commodity to which the exemption in section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including by-product operations, which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable. * * *

The above interpretation was first formally announced, in substantially its present form, in Wage and Hour Release No. 1892, January 25, 1943, and has been outstanding, and consistently applied, ever since.[8] Even if the question were otherwise dubious, the consistent interpretation of the Act by the agency charged with its enforcement would, we submit, be controlling.[9] See *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner* v. *Mitchell*, 350 U.S. 247, 255. That interpretation is further required by

[8] See also 17 Fed. Reg. 9615, construing "first processing" as limited to "the initial operation which changes the form of the whole fresh fruit or vegetable and all operations on its main portions when performed in a single process as a continuous series of operations throughout which the commodity remains perishable * * *."

[9] Even if not controlling on the interpretation of § 7(c), the Administrator's definition of the term "first processing" would seem necessarily to govern the meaning of that term as used in the Administrator's own industry determination under § 7(b)(3) (see note 1, *supra*). See, *e.g.*, *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832 (C.A. 5).

the settled principle that exemptions from the Fair Labor Standards Act are to be "narrowly construed." *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617.

b. While we think it clear that Oregon is not entitled to an exemption even when engaged only in repackaging vegetables previously frozen by it, there is a further reason why the exemption is inapplicable during periods when it is also engaged in mixing and packaging vegetables purchased, already frozen, from other processors. The processing of such vegetables is undeniably broken when they are packaged in bulk by the original processor and sold and shipped to Oregon, and Oregon's subsequent mixing operations seem clearly to be a "second" processing. That result is also required by the interpretive regulations under § 7(c), which, as noted above, should be controlling (29 C.F.R. (1958 Supp.) 780.51(b)(2)):

> Where first processing operations are performed at one place of employment on a commodity named in section 7(c), and further processing operations on the processed commodity are then performed at another place of employment, such further processing operations are not part of the "first processing" of the named commodity which commenced at the first place of employment, but comprise a separate process. * * *

Since Oregon's mixing operations commence, as to such vegetables, not with "fresh" vegetables but with already frozen vegetables, those operations, viewed separately, cannot independently qualify for the exemption.

In allowing the exemption even during the mixing operations, the decision below is also in substantial conflict with that of the Court of Appeals for the Tenth Circuit in *Domenico* v. *Mitchell*, 232 F. 2d 112. In that case, the employer, engaged primarily in packing and distributing fresh vegetables purchased from nearby farmers, also purchased "mountain grown" vegetables which had been previously packed by others. Work performed by the employer on the latter vegetables (handling from one car to another, re-icing the cars, or repacking broken crates) was held not to be within the § 7(c) exemption for "first processing." While the cases are arguably distinguishable in that in *Domenico* the second processor was in part "re-doing" what had already been done, while Oregon performs a "further" operation, that distinction would seem, if anything, to make the operations here even more clearly second processing.

3. It is important that the question be promptly resolved. As a practical matter, the protection to workers afforded by the Fair Labor Standards Act is effective only prospectively from the resolution of questions of interpretation of the Act. Individual employees seldom have a sufficient financial interest to sue for unpaid wages, particularly if an unsettled question is involved, and recovery of unpaid overtime depends largely upon suits brought by the Secretary on behalf of the employees under § 16(c). The Secretary, however, is expressly foreclosed from bringing such a suit "in any case involving an issue of law which has not been settled finally by the courts" (§ 16(c)). In such cases, the Secretary must proceed

by an injunction action under § 17 (in which the court has no jurisdiction to award back pay), and it is only after the injunction suit has been finally resolved and the issue settled that the Secretary may sue for the employees' unpaid wages.[10] When, long after the violations were discovered, a back-pay suit is finally initiated, the recovery is limited to wages accruing within two years of the commencement of the back-pay action (§ 6, Portal-to-Portal Pay Act, 61 Stat. 87, 29 U.S.C. 255). The practical effect of these provisions is that enforcement of the Act in any contested areas is effectively prevented pending final resolution of the question in injunction cases. This case, initiated in July 1954, has now been in the courts four and a half years, and an attempt to develop a conflict in another circuit would delay enforcement of the employees' rights, even if ultimately upheld, for several more years.

Effective enforcement of the Act in the food-processing industry has already been delayed for many years by the controversy over the Administrator's definition of the "area of production" (within which persons engaged in enumerated operations upon agricultural commodities are exempted by § 13(a)(10) from both the minimum wage and the overtime requirements of the Act). The Administrator's original definition was held invalid in 1944 in

[10] "Even a cursory examination of these provisions shows that the injunction is the only effective device available to the Secretary when coverage is in doubt and he wishes to establish the availability of the Act to employees not theretofore afforded its protections". *Mitchell* v. *Lublin, McGaughy & Associates*, No. 37, this Term, decided January 12, 1959.

Addison v. *Holly Hill Co.*, 322 U.S. 607, and the validity of the revised definition was not finally upheld until this Court's decision in 1956 in *Mitchell* v. *Budd*, 350 U.S. 473. In the meantime, many frozen foods processors, including Oregon, challenged the validity of the definition and claimed exemption under § 13(a)(10).[11] Now that that question has been settled, persons not within the area of production as defined by the Administrator (as Oregon is not) are asserting claims of exemption from the overtime requirements under § 7(c), and that question has now come to the forefront. To forestall further delays in the enforcement of the Act in the frozen foods industry, that question should be promptly settled.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

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United States Department of Labor.

FEBRUARY 1959.

[11] Oregon claimed an exemption under § 13(a)(10) in the district court, but the claim was denied after this Court's decision in the *Budd* case. There is still, of course, an unresolved question whether frozen food processors are within the § 13(a)(10) exemption even if located in the "area of production."

APPENDIX A

In the United States Court of Appeals
for the Ninth Circuit

No. 15,579—Apr. 16, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Before FEE and CHAMBERS, *Circuit Judges*, and CHASE A. CLARK, *District Judge*

CHASE A. CLARK, *District Judge*:

This action was brought by the Appellant to enjoin the Appellees from violating provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. Sec. 201 et seq. The facts, as found by the trial court, are set out in that Court's opinion at 145 F. Supp. 157.

The issue on appeal relates to the trial court's holding that the "repackaging of bulk frozen corn and carrots after the active season ends and the mixing of frozen vegetable mix and the storing of frozen vegetables" are exempt under Section 207(b)(3) and 207(c) as acts being part of the first processing of perishable or seasonal fresh fruits or vegetables.

Pertinent provisions of Title 29, United States Code, are as follows:

SECTION 206. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1 an hour; * * *.

SECTION 207. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employees for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature * * *

(c) * * * in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations * * * the provisions of subsection (a) of this section, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

A determination of what constitutes "first processing" depends upon the facts of each individual case. This question was resolved by the trial court's finding, as to the products here in question, "'that 'first processing' is completed when the products are packaged in consumer size packages even though delayed."

It was for the trial court to appraise the evidence, both the agreed facts and the testimony presented, and to draw or reject inferences therefrom. The trial court is the finder of facts, and as found, those facts support the conclusion adopted.

Having concluded that the case here turns upon the factual issues, decided by the able Judge of the District Court, the Judgment below is Affirmed.

(Endorsed:) Opinion. Filed Apr. 16, 1958.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 15,579

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEE

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered April 16, 1958.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX C

In the United States Court of Appeals for the Ninth Circuit

No. 15,579—Sept. 24, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEES

UPON PETITION FOR REHEARING

Before FEE and CHAMBERS, *Circuit Judges,* and CHASE A. CLARK, *District Judge*

PER CURIAM: The petition for rehearing assumes that this Court has followed an incorrect approach and has held that the findings of the trial court were affirmed because not found clearly erroneous. We take our stand firmly upon the findings of fact and the able opinion of the District Judge, which clearly interprets the statute in the light of the facts so found. *Mitchell* vs. *Oregon Frozen Foods Company,* 145 F. Supp. 157, 162–163. But this Court simply found that the interpretation of the clause of the statute relating to "first processing,"[1] in view of the facts found in the record, was correct. We do not view the ruling as applicable only in this case, but as an interpretation universally valid when such a state of facts arises. However, an interpretation cannot be made without facts. The interpretation placed upon

[1] 29 U.S.C.A. § 207(c).

such facts relating to the fruit and vegetable industry by a judge fully cognizant of the problems of farmers and orchardists in an agricultural area is entitled to high respect. It has heretofore often been pointed out that Congress attempted to alleviate the burdens placed upon farmers and orchardists by exceptions of which this clause is an example.[2] The processor does not pay the toll of the statute. Therefore, the exception is for the benefit of the producer.

The stock argument that one claiming an exemption must bear the burden of proof to show that it is applicable on the facts is entirely inconsistent with the argument that the findings of fact can have no weight in the interpretation of the language. In this area, the appellate courts have consistently given weight to interpretations by the trial judges familiar with conditions.

There is nothing in our decision in *Union Pacific Railroad Company* vs. *Ore-Ida Potato Products, Inc.*, 9 Cir., 252 F. 2d 505, which is applicable here. It was there held that potatoes which were washed, peeled, sliced, steamed or washed, oil blanched, at 350° Fahrenheit for one and one-half minutes and then quick frozen, were not "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened)," within the tariff prescribing shipment rates for such vegetables. We there held the findings of the trial court "contrary to the undisputed evidence" and "clearly erroneous."

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[2] *Walling* vs. *California Conserving Co.*, 74 F. Supp. 182, 184, affirmed sub nom. *McComb* vs. *Hunt Foods, Inc.*, 9 Cir., 167 F. 2d 905, 906, cert. den., 335 U.S. 845; *McComb* vs. *C. H. Musselman Co.*, 74 F. Supp. 185 (sustained by the Court of Appeals for the Third Circuit, although there is no reported opinion); *Hendricks* vs. *Di Giorgio Fruit Corporation*, 49 F. Supp. 573, 576.

In a footnote we pointed out that decisions under the clause here under consideration were not "particularly helpful" in deciding that case.[4] Markedly, that tariff declares "vegetables" are "fresh or green" although "frozen." The essence of that opinion is that "Frozen vegetables which have been partially cooked and are no longer wholly raw are not frozen fresh vegetables." We affirm that decision. The usages of trade are in accord.

The attempt to import into this field questions relating to business establishments and independent contractors illustrates the fact that the government agency has never appreciated the purpose of Congress to alleviate the weight of the provisions of the act in reference to farmers and orchardists.

"First processing" should not apply to picking, gathering, digging of vegetables or fruits. It certainly is absurd to say it is accomplished by storing, as appellant seems to urge. It would be likewise a perversion to say that "storing" in a cool place was processing. If the cold be mechanically applied, no difference is apparent. If the temperature be artifically decreased so the product is frozen, still no processing has been accomplished. No significant change has taken place. Until such a change takes place, there is no processing. Cooking in oil might well be held to be processing. But that question is not before us. The whole emphasis of the clause in question is upon the words "first processing." Neither freezing nor subjection to steam is processing in common acceptance of the term or in trade usage. Decay is stopped by such methods, but there is no essential change such as is attained by the manufacturing process of blanching in oil. We do not rely upon dic-

[4] *Union Pacific Railroad Company* vs. *Ore-Ida Potato Products, Inc.*, 9 Cir., 252 F. 2d 505, 508, note 8.

tionary definition, as it is believed that stored apples subject to refrigeration are not, in either vulgar or trade usage, described as "processed." Likewise, frozen fresh strawberries are not viewed as processed by the consumer. "Process" is defined by the dictionary as "to subject to some special process or treatment, as in the course of manufacture."

We affirm our holding, deny the petition for rehearing and reject the suggestion of a rehearing en banc.

(Endorsed:) Per Curiam Opinion upon Petition for Rehearing. Filed Sept. 24, 1958.

PAUL P. O'BRIEN, *Clerk.*

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